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New frontiers of regulation: domestic work, working conditions and the holistic assessment of non-standard work norms

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Introduction

Performed in the domestic sphere, characterised by caring labour and profoundly gendered, domestic work has long been emblematic of informality, its capacity for legal regulation dismissed or disregarded. Yet an evolving trend of national regulatory intervention has recently shifted to the international level, as domestic work has become the subject of a debate on the extension of EU norms to domestic workers and of an International Labour Organization (ILO) standard-setting process that generated the Domestic Work Convention, 2001 (No 189) and Recommendation (No. 201). This paper examines these regulatory projects, which are poised at the nexus of human rights and labour law.

The paper responds to the flourishing of domestic work regulation as an opportunity to assess the status of working conditions rights in the project of ‘non-standard’ work (NSW) regulation. It builds on an ongoing research project that is tracing the contemporary global evolution of working conditions regulation,² with a focus on wages, working hours and work/family reconciliation, and on a contribution to the ILO standard-setting.³ The starting point of the paper is that the research literature on precarious work and substantive measures designed to protect non-standard workers (NSWs) are now sufficiently evolved to integrate their findings and advances into analyses of the “mainstream” of labour law and its sub-fields.

A category of both labour law and human rights discourses, the status of working conditions rights haunts both of these legal fields. In the labour law sphere, working conditions protections are routinely subordinated to other goals, whether growth objectives, in the economic and development literatures, or, in legal analyses, protections designated, according to a range of criteria, to be ‘fundamental.’ More recently, however, the contemporary backdrop to labour law debates – the repercussions of the global financial crisis – has prompted a reformulation of discourses on the role of working conditions regulation, including as part of a concern to promote ‘job quality.’ In the field of human rights, conditions of work have been assigned a secondary status among social rights that parallels the more contentious, and more frequently explored, subordination of social rights to civil and political rights.⁴ Recently, however, the concepts and language of human rights have

¹ School of Law, University of Manchester, UK. I am grateful to Judy Fudge, Sangheon Lee and Jillian Murray for their insightful comments on an earlier draft. Thanks are due also to the participants at the *Workshop on Precarious Work and Human Rights*, Minerva Center for Human Rights, Hebrew University of Jerusalem, 15-16 May 2011.

² See Deirdre McCann *Working Conditions in Contemporary Labour Law Policy: The Transnational Arena*, INTERNATIONAL LABOUR REVIEW (forthcoming 2012).

³ DEIRDRE MCCANN AND JILLIAN MURRAY, THE LEGAL REGULATION OF WORKING TIME IN DOMESTIC WORK (2010), http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_150650.pdf.

⁴ Jo Hunt, *Fair and Just Working Conditions*, in ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS – A LEGAL PERSPECTIVE (Tamara Hervey and Jeff Kenner eds., 2003); Deirdre McCann *Decent Working Hours as a Human Rights: Intersections in the Regulation of Working Time*, in HUMAN RIGHTS AT WORK: PERSPECTIVES ON LAW AND REGULATION (Colin Fenwick and Tonia A Novitz eds., 2010).

permeated labour law's engagement with working conditions, and the intersections of these fields are being identified.⁵ This paper, then, is situated at the nexus of the discourses of "precariousness," "job quality," and "just and favourable" working conditions.

To situate domestic work in the evolution of conditions of work regulation, the paper first examines key policy discourses within the transnational arenas, emanating from the ILO (the twin *Declarations* and *Global Jobs Pact*), the World Bank (the 'Employing Workers' dimension of the *Doing Business* project) and the European Union (the European Employment Strategy). Section One explores the recent history of conditions of work in these regulatory arenas, including the evolution of the relevant policy discourses in the wake of the crisis. Section Two examines two transnational-level projects of domestic work regulation mentioned earlier: the debates on the exclusion of domestic workers from key European Union (EU) working conditions standards and the ILO standard-setting on domestic work. Two themes are singled out to underpin these projects: an evolving notion of working conditions rights as fundamental, and the particular resonance of legal frameworks on domestic work to the evolution of regulatory strategies of conditions of work. Both are argued to challenge policy makers and researchers to attend to the interplay of precarious work regulation and mainstream working conditions norms.

1. The transnational regulatory policy debates: working conditions in post-crisis labour law

A crucial, but generally overlooked, insight into early twenty-first century labour law is that it can be conceptualised as a struggle over the role and significance of regulatory frameworks on conditions of work: their objectives, their implications for growth strategies, the relative effectiveness of the available regulatory strategies, the status of the entitlements that these laws embody, and particularly whether these rights can be subordinated to economic goals.⁶ Conflicting assertions on the significance and modes of regulating wages, working hours and work/family entitlements frame contemporary labour law reform, even if implicitly, across the globe.⁷

Over the last decade, however, conditions of work have attained a particular prominence, and exhibited distinct dynamics, at the transnational levels, where they are embodying broader conflicts over the necessity of ensuring acceptable working conditions and the role of legal regulation in realising this goal. This assertion can be illustrated by considering the status and evolution of working conditions within the employment policy discourses of three of the central transnational forums: the International Labour Organization, World Bank and European Union. Although the evolution of these transnational policy fields is considered elsewhere in more detail,⁸ it is worth briefly reviewing in this context. The purpose is to set the scene for the subsequent discussion of conditions of work in the regulation of domestic work, by illustrating the significance of working conditions to contemporary policy on labour market regulation. The particular focus is on how these discourses have evolved in the wake of the global financial crisis.

⁵ On working time, see McCann *id.*

⁶ See further McCann, *supra* note 2.

⁷ See e.g. SANGHEON LEE AND FRANCOIS EYRAUD (EDS), *GLOBALIZATION, FLEXIBILIZATION AND WORKING CONDITIONS IN ASIA AND THE PACIFIC* (2008).

⁸ McCann, *supra* note 2.

Until relatively recently, conditions of work were strikingly subordinate within the guiding policy discourses of the International Labour Organization. The identification of select international labour standards as “core” in the *Declaration on Fundamental Principles and Rights at Work* (1998) propelled ILO regulatory strategy into the human rights debates on the indivisibility of the human rights canon and the subordination of social to civil and political rights.⁹ This debate embraced the status of working conditions rights, which were variously argued to be a fundamental element of an indivisible human rights canon, illegitimately exiled by core/non-core thinking,¹⁰ or effectively sustained by the core standards, as an outcome of the “procedural” right to collectively bargain.¹¹ Whatever the merits of these various contentions, it is apparent that conditions of work were not at the forefront of the ILO’s contributions to the policy debates on economic globalization.¹²

The era of the core/non-core debates in the ILO coincided with an incursion of the International Financial Institutions (IFIs) into the field of labour law that has shaped international and domestic policy discourses on conditions of work. The quantification and ranking of domestic labour law regimes in the World Bank’s *Doing Business* (DB) project¹³ can be addressed as the forceful entry of the Bank into the domain of labour law, a threat to the position of the ILO as the pre-eminent source of guidance on labour market regulation at the international level, or as a contribution to the evolving methodologies for the quantification and comparison of labour law regimes.¹⁴ It is, equally, an extension of the international-level flexibility narrative more firmly to grasp conditions of work regulation, through the project’s *Employing Workers Index* (EWI) and the translation of its outcomes into policy guidance that promotes deregulated markets.¹⁵ The *Doing Business* project co-opted the core/non-core narrative, with the kinds of outcomes feared by the critics of the 1998 Declaration. At the level of methodology, the EWI subjects only certain elements of labour law frameworks, and none of the core entitlements, to quantification and ranking. The

⁹ Phillip Alston *Facing Up to the Complexities of the ILO’s Core Labour Standards Agenda* 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 467 (2005); Philip Alston and James Heenan, *The Shrinking of the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?* 36 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 221 (2004); Brian Langille *Core Labour Rights – The True Story (Reply to Alston)* 16(3) EUROPEAN JOURNAL OF INTERNATIONAL LAW 409 (2004); Francis Maupin *New Foundation or New Façade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalization* 20(3) EUROPEAN JOURNAL OF INTERNATIONAL LAW 823 (2009).

¹⁰ Alston, *id.*; Alston and Heenan, *id.*

¹¹ Langille, *supra* note 9.

¹² See in particular ILO, A FAIR GLOBALIZATION: CREATING OPPORTUNITIES FOR ALL (2004), <http://www.ilo.org/public/english/wcsdg/docs/report.pdf>.

¹³ See further Kevin E Davis and Michael B Kruse, *Taking The Measure of Law: The Case of the Doing Business Project* 32(4) LAW AND SOCIAL INQUIRY 1095 (2007); Sangheon Lee and Deirdre McCann, *Measuring Labour Market Institutions: Conceptual and Methodological Questions on “Working Hours Rigidity,”* in DEFENCE OF LABOUR MARKET INSTITUTIONS: CULTIVATING JUSTICE IN THE DEVELOPING WORLD (Janine Berg and David Kucera eds., 2008); Janine Berg and Sandrine Cazes *Policymaking Gone Awry: The Labor Market Regulations of the Doing Business Indicators* 29(4) COMPARATIVE LABOR LAW AND POLICY JOURNAL 349 (2009).

¹⁴ For alternatives, see e.g. Simon Deakin and Pradipta Sarkar, *Assessing the Lon-Run Economic Impact of Labour Law Systems: A Theoretical Reappraisal and Analysis of New Time Series Data* INDUSTRIAL RELATIONS JOURNAL 39 453 (2008); Richard Mitchell, Peter G Gahan, Andrew Stewart, Sean Cooney and Shelley D Marshall *Evolution of Labour Law in Australia: Measuring the Change* 23(1) AUSTRALIAN JOURNAL OF LABOUR LAW 61 (2010).

¹⁵ For example, WORLD BANK DOING BUSINESS 2011 (2010). On the EWI, see Lee and McCann, *supra* n 13; Berg and Cazes, *supra* note 13; Sangheon Lee, Deirdre McCann, and Nina Torm, *The World Bank’s “Employing Workers” Index: Finding and critiques – A review of recent Evidence* 147(4) INTERNATIONAL LABOUR REVIEW 416.

accompanying policy literature has extolled the core norms, while depicting other legal entitlements as harbourers of damaging economic impacts that are particularly unsuited to developing economies.¹⁶

During this period, the European Union was the transnational arena in which the incorporation of job quality objectives into employment policy discourse was most vigorously pursued. The EU policy mechanism, the European Employment Strategy (EES), aspires to the harmonisation of Member State employment policies through a ‘soft law’ approach, which encompasses benchmarking, information dissemination and EU-level guidance on the coordination of national employment policies.¹⁷ Articulated as a guiding objective of the Union’s overarching ‘Lisbon Strategy’ (2000-2009),¹⁸ an aspiration for ‘more and better jobs’ was integrated into the employment policy regime. Here, it was translated into guidance to Member States from the European Commission that assumed the indivisibility of job quality and employment creation,

Efforts to raise employment rates go hand in hand with improving the attractiveness of jobs [and] quality at work....¹⁹

Although in effect the quality dimension was downgraded during the life of the Lisbon Strategy,²⁰ it nonetheless remained in the concrete policy discourses and guidance, including in specific reference to conditions of work: to increase employment, ‘[t]he quality of jobs, including pay and benefits, working conditions, access to lifelong learning and career prospects, are crucial....’²¹

More recently, and particularly after the financial crisis and subsequent recession, a substantial reframing of these three central transnational policy narratives has been evident, which has encompassed a reassessment of the role and status of legal frameworks on conditions of work. The ILO’s 2008 *Declaration on Social Justice for a Fair Globalization*,²² although characterised as “drawing on and reaffirming” its 1998 antecedent, suggests a consensus to avert the more hazardous implications of the core/non-core dichotomy. The range of objectives identified by the ILO as its contemporary preoccupations (the “strategic objectives” of fundamental principles and rights at work, employment, social protection, social dialogue²³) are characterised in the 2008 Declaration as “equally important” (I.A) and “inseparable” (I.B). Further, the Declaration sharpens the earlier, strikingly narrow, conception of social protection, which had been substantially equated with social security

¹⁶ Lee and McCann, *supra* note 13.

¹⁷ See further Janine Goetschy, *The Lisbon Strategy and Social Europe: Two Closely Linked Destinies*, in EUROPE, GLOBALIZATION AND THE LISBON AGENDA 74-90 (MJ Rodriguez ed 2009).

¹⁸ See, for example, Mark Smith, Brendan Burchell, Colette Fagan and Catherine O’Brien, *Job Quality in Europe* 39(6) *Industrial Relations Journal* 586 (2008).

¹⁹ Council Decision of 15 July 2008 on Guidelines for the Employment Policies of the Member States 2008/618/EC.

²⁰ Martina Dieckhoff and Duncan Gallie *The Renewed Lisbon Strategy and Social Exclusion Policy* 38(6) *INDUSTRIAL RELATIONS JOURNAL* 480 (2007); Smith et al, *supra* note 18.

²¹ Council Decision of 15 July 2008, *supra* note 19, Guideline 17.1.

²² The 2008 *Declaration* follows its 1998 antecedent and the 1944 *Declaration of Philadelphia* as the third “major statement of principles and policies” since the founding of the International Labour Organization. On the 2008 Declaration generally, see Maupin, *supra* note 9.

²³ The ILO’s work has been centred on the four strategic objectives since the International Labour Office’s March 1998 budget proposal. The four objectives were subsequently elaborated as the conduits to decent work: ILO DECENT WORK (1999).

systems and largely excluded working conditions beyond health and safety.²⁴ It explicitly refers to conditions of work, which are enshrined - in a meaningful reversion to the language of the Declaration of Philadelphia - as a call for,

[P]olicies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all and a minimum living wage to all employed and in need of such protection.²⁵

The 2008 Declaration, then, returned working conditions to the central ILO discourse on economic globalisation. This stance has since been confirmed in the wake of the financial crisis, in the Organization's 2009 *Global Jobs Pact* (although accompanied by a degree of uncertainty on the role and design of legal regulation that is examined in detail elsewhere).²⁶

The legal dimension of the ILO's work has also offered a distinct conceptualisation of conditions of work, which parallels that of the policy sphere. In this context, working conditions rights have been framed within a human rights discourse; a discursive shift that can be read as part of a broader intensification of labour law's engagement with the language, concepts and institutions of human rights law.²⁷ This theme is most prominent in the 2005 *General Survey*²⁸ of the Committee of Experts on the Application of Conventions and Recommendations on the 'parent' working time standards, the Hours of Work Conventions, Nos. 1²⁹ and 30.³⁰ The *General Survey* reviewed the conformity of ILO member State regulatory regimes with Convention Nos. 1 and 30 and the prospects for the ratification and implementation of these standards. In making this assessment, the Committee explicitly adopted the language of human rights.³¹ The report reframes the ILO Constitution's support for hours of work regulation with a "human rights' perspective," which it elaborates as a notion of universality:

[E]very worker in the global economy should be entitled to a certain standard concerning maximum duration of her or his work as well as minimum duration of rest, and should be entitled to such protection regardless of where she or he happens to be born or to live.³²

This assertion was bolstered by a reference to the working time standards of the international human rights instruments.³³

During the period in which ILO policy and legal discourses were being reassessed and reframed, the *Doing Business* project has been subject to intense criticism, both external³⁴

²⁴ ILO, *id.*

²⁵ I.A(ii).

²⁶ ILO RECOVERING FROM CRISIS: A GLOBAL JOBS PACT (2009). See McCann, *id.*

²⁷ See PHILIP ALSTON, LABOUR RIGHTS AS HUMAN RIGHTS (2005); Judy Fudge, *The New Discourses of Labour Rights: From Social to Fundamental Rights?* 29(1) COMPARATIVE LABOR LAW AND POLICY JOURNAL 29 (2007); Fenwick and Novitz, *supra* note 4.

²⁸ ILO HOURS OF WORK: FROM FIXED TO FLEXIBLE? (2005). See further McCann, *supra* note 4.

²⁹ Hours of Work Convention, 1919 (No. 1).

³⁰ Hours of Work Convention, 1930 (No. 30).

³¹ Compare, for example, ILO, HOURS OF WORK. EXTRACT FROM THE REPORT OF THE 37TH (1967) SESSION OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS (1967).

³² ILO, *supra* note 28, at 103.

³³ *Universal Declaration of Human Rights*, Article 24; *International Covenant on Economic, Social and Cultural Rights*, Article 7(3). See ILO, *supra* note 28, at 103.

and by the Bank's independent review body, the Independent Evaluation Group.³⁵ In response, the Project is in the throes of being refashioned in design and function, and repackaged at the discursive level, with outcomes that remain as yet uncertain. The Bank disowned the 2009 iteration of the EWI³⁶ by announcing that it did not reflect World Bank policy, suspending its use in country-level policy advice,³⁷ temporarily removing it from the overall DBI score, relegating it to an annex in the project's annual reports³⁸ and subjecting it to a revision that is ongoing.³⁹

These developments are pursued in more detail elsewhere.⁴⁰ For present purposes, the most significant element in this overhaul is the evolution of the Bank's treatment of working conditions. Efforts to reform the EWI have involved a rethink of the core/non-core paradigm, which is paralleling the ILO's reassessment. In this case, incremental changes to the EWI (in particular in the 2010 *Doing Business* report⁴¹), have prompted the Bank to assert the conformity of the Index with the expanse of relevant ILO standards, including those on conditions of work. While the accuracy of this claim is doubtful (and the capacity of the Bank to render it questionable), the recourse to the ILO standards raises the profile of conditions of work within the DB legal policy discourses. Perhaps more significantly, the Bank's ongoing efforts to develop a 'Worker Protection Indicator' (WPI), which would incorporate regulatory frameworks on conditions of work, suggest a degree of acceptance of regulatory objectives that extend beyond facilitating the "business environment."

Finally, post-crisis EU-level policy has confirmed the prior trajectory of the EU's social policy project⁴² by formalising the displacement of job quality at the level of policy discourse. In recent years, the elaboration of conditions of work in EU employment policy has been subsumed in the articulation of the successor to the Lisbon Strategy, christened 'Europe 2020.'⁴³ Crafted in the inhospitable aftermath of the crisis, the Europe 2020 strategy is characterised by a downplaying of conditions of work, which has been explicitly subordinated to economic goals. Europe 2020 is underpinned by a mantra of 'sustainable and inclusive growth,' which aligns EU employment policy ever more firmly with the neoliberal tenor of the Union's guidance on economic strategy.⁴⁴ A job quality objective remains in the Commission's guidelines for national employment policies, although in muted and narrowed terms,

³⁴ For a review of the critical literature, see Lee et al, *supra* n 15.

³⁵ WORLD BANK INDEPENDENT EVALUATION GROUP, *DOING BUSINESS: AN INDEPENDENT EVALUATION. TAKING THE MEASURE OF THE WORLD BANK-IFC DOING BUSINESS INDICATORS* (2008), http://siteresources.worldbank.org/EXTDOIBUS/Resources/db_evaluation.pdf

³⁶ WORLD BANK, *REVISIONS TO THE DOING BUSINESS EMPLOYING WORKERS INDICATOR* (Memorandum, April 2009), available from www.doingbusiness.org [last accessed 5 February 2012].

³⁷ The EWI no longer forms part of the Bank's *Country Policy and Institutional Assessments* (CPIA) (World Bank, *id.*

³⁸ See World Bank, *supra* note 15.

³⁹ World Bank, *supra* note 36. The EWI country data remains available on the *Doing Business* website. See <http://www.doingbusiness.org/data/exploretopics/employing-workers> [last accessed 5 February 2012].

⁴⁰ McCann, *supra* note 2.

⁴¹ World Bank, *supra* note 36.

⁴² Jean-Claude Barbier, *Changes in Political Discourses from the Lisbon Strategy to Europe 2020: Tracing the Fate of 'Social Policy'?* ETUI Working paper 2011.01 (2011). On job quality, see Dieckhoff and Gallie, *supra* n 18; Smith et al 18.

⁴³ COMMISSION OF THE EUROPEAN COMMUNITIES, *EUROPE 2020: A EUROPEAN STRATEGY FOR SMART, SUSTAINABLE AND INCLUSIVE GROWTH* (2010).

⁴⁴ Council Recommendation 2008/390/EC of 14 May 2008 on the broad economic policy guidelines for the Member States and the Community (2008-2010) Official Journal L 137 of 27.5.2008.

The quality of jobs and employment conditions should be addressed. Member States should combat in-work poverty⁴⁵ and promote occupational health and safety.⁴⁶

Work-life balance policies are also alluded to, incorporating a reference to innovation in work organisation, yet are forcefully aligned with supply-side objectives.⁴⁷ These developments in the employment policy sphere have been paired with ongoing efforts to reform the EU's 'hard law' on working conditions, which are returned to in Section Two.

2. Towards a holistic assessment of non-standard work norms: conditions of work in the domestic work project

The previous Section has assessed the recent evolution of working conditions regulation by analysing a set of transnational legal policy discourses that directly address this dimension of working life. The central purpose of this paper, however, is to suggest that a novel approach be injected into such analyses, which is capable of enriching and refining them. The central contention is that this legal landscape should be conceptualised as in part determined by the presence of working conditions in the regulatory treatment and policy discourses of non-standard work; that the nature and effects of conditions of work regulation, and by extension of labour law as a whole, must be understood to be in part defined by the legal treatment of non-standard workers. In consequence, the research on any sub-field of labour market regulation, it is argued, should no longer focus exclusively on what may be termed 'mainstream' norms: those legal instruments that are generally-applicable across the labour force as a whole. Instead, it should be expanded to embrace those measures specifically tailored to govern some (or all) of the various forms of 'non-standard' work.

This conceptual strategy can be suggested to have a number of assets. First, it would expand the analysis of the sub-field of working conditions regulation to embrace the regulatory norms that govern the most vulnerable workers, including the vast part of the labour force in low-income settings and a substantial proportion of women in most countries. The holistic approach would thereby elicit a more accurate and comprehensive understanding of the evolution of the field than would an exclusive preoccupation with mainstream norms. Secondly, this strategy would nudge the precarious work literature towards assessing the trend towards NSW regulation across a more expansive geography, by assessing its place within labour law edifices as a whole. In consequence, this scholarly project could investigate the implications of NSW frameworks for mainstream norms. NSW regulation is continuing to evolve, in scope and substance, in an era in which labour law's conventional protective frameworks and techniques are subject to pressures that at least stall their evolution and perhaps threaten their survival. An intuition pursued in this paper is that NSW regulation can therefore be expected to exercise an influence on the content of mainstream norms, in the post-crisis urge for legal reform and beyond. The purpose of this paper is to draw on these

⁴⁵ Preventing in-work poverty is also a feature of Guideline 10 ("promoting social inclusion and combating poverty"). Equal pay is addressed in Guideline 7, in a call to promote gender equality.

⁴⁶ Council Decision of 21 October 2010 on guidelines for the employment policies of the Member States 2010/707/EU, Guideline 7 ("increasing labour market participation and reducing structural employment").

⁴⁷ *Id.*, Guideline 7, para 3 ("geared to raising employment rates, particularly among young people, older workers and women").

insights by investigating the precarious work/working conditions nexus as it emerges in the regulation of domestic work.

Recent research on national labour law regimes has confirmed domestic work to be subject to a widespread exclusion from labour law frameworks, which can be attributed to the intersection of its gendered complexion, as a highly feminised work-form, and its location, in the private home.⁴⁸ As a result, domestic work has been constrained within regulatory paradigms that assume its ‘exceptionalism,’ as a form of labour market engagement unsuited to the standard array of labour law protections. In recent decades, however, and in particular in the wake of the heightened recourse to outsourced care work in advanced industrialised countries, and evolving efforts in developing countries to improve the quality of informal employment, concentrated efforts have been made to regulate domestic work. The outcomes embrace elaborate regulatory regimes in both the industrialised world, perhaps most notably in France and Switzerland,⁴⁹ and in low-income settings, including pioneering statutory frameworks in South Africa and Uruguay.⁵⁰ Most recently, the impulse to regulate domestic work has surfaced at the international level, to produce the ILO Domestic Work Convention, 2001 (No 189) and Recommendation (No. 201) in July 2011.

This project of domestic work regulation can be argued to open up twin frontiers of regulation. First, and most evidently, if the various forms of NSW, drawing on Vosko,⁵¹ can be conceptualised according to a typology of displacement from the SER, domestic work frameworks extends the regulatory project more firmly to embrace divergence along the axis of location. To illustrate, the ILO’s episodic project of NSW regulation first addressed locational displacement from the SER in the homeworking standards, Convention No. 177⁵² and Recommendation No. 184,⁵³ to embrace waged labour carried out in the worker’s home. The new standards on domestic work extend this intervention, by legitimating regulation of wage-work relationships in which the home/workplace belongs to the employer.

It is the contention of this paper, however, that the domestic work project should be understood to open a second, less readily apparent, frontier of regulatory engagement. Domestic work standards, it is argued, are addressing the regulation of conditions of work more elaborately than prior NSW initiatives. Earlier NSW frameworks have been criticised for their deficient embrace of working conditions. Vosko has highlighted, for example, the cursory treatment of working time in the ILO’s homework standards, despite the excessive hours associated with piecework having featured prominently in the preceding debates.⁵⁴ In contrast, this paper argues, conditions of work has a striking intensity in the domestic work project, at both the discursive level and in regulatory design. Further, the potential for heightened global regulatory intervention on domestic work, in the wake of the ILO standards, suggests the urgency of directing research attention towards the status and configuration of conditions of work in the domestic work project.

⁴⁸ ILO, *DECENT WORK FOR DOMESTIC WORKERS* (2010).

⁴⁹ See Manuela Tomei, *Decent Work for Domestic Workers: An Achievable Goal or Wishful Thinking? in REGULATING FOR DECENT WORK. NEW DIRECTIONS IN LABOUR MARKET REGULATION* (Sangheon Lee and Deirdre McCann eds. 2011).

⁵⁰ ILO, *supra* note 48.

⁵¹ LEAH VOSKO, *MANAGING THE MARGINS: GENDER, CITIZENSHIP, AND THE INTERNATIONAL REGULATION OF PRECARIOUS EMPLOYMENT* (2010).

⁵² Homework Convention, 1996 (No. 177).

⁵³ Homework Recommendation, 1996 (No. 184).

⁵⁴ ILO, *DOCUMENTS OF THE MEETING OF EXPERTS ON THE SOCIAL PROTECTION OF HOMEWORKERS* (1990).

This paper responds to that need by assessing two prominent transnational regulatory projects of contrasting fates. The first is the stalled regulatory project on the reform of the EU Pregnant Workers Directive.⁵⁵ The second, the standard-setting process that culminated in the adoption of the ILO instruments on domestic workers. In doing so, the paper highlights the central regulatory strategies on NSW that characterise these projects. These strategies are categorised as: (1) expansion: the extension of generally-applicable norms to cover NSWs; (2) equal treatment: the introduction of legal entitlements for NSWs to be accorded equal treatment to comparable SER workers; and (3) specific regulation: the design of regulatory measures and techniques tailored to the specificities of the individual NS work-forms. Drawing on this typology, it is argued that the domestic work project is offering at least two contributions to the evolution of working conditions regulation: (1) in the expansion strategy, an elaboration of working conditions entitlements as fundamental (Section 2.1); and (2) in the specific regulation model, the development of strategies for the regulation of working conditions that can be expected to influence mainstream norms (Section 2.2).

2.1 The expansion strategy: working conditions entitlements as ‘fundamental’

EU labour market policy actors are currently enmeshed in a set of interlinked regulatory reform processes that are propelled by an asserted need to reform the Union’s working conditions standards. Poised between the language of social protection and a discourse of the urgent need for ‘modernisation’ of European labour law structures,⁵⁶ these reform efforts impinge on domestic work regulation through a debate on the deployment of the expansion strategy, and in particular the extension of the Pregnant Workers’ Directive (PWD)⁵⁷ to cover domestic workers.

The contention of this paper is that these legislative reform efforts are of some significance to the evolution of working conditions regulation. Indeed, their influence extends beyond the EU to other transnational and national legal policy settings. Shadowing its role in shaping legal regimes across the Member States, the EU legal order is a global model, which feeds into the contemporary international processes that circulate labour law strategies and frameworks. Despite the unique aspects of EU labour laws as a transnational minimum “frame,” designed to be fleshed out by diverse national regimes, its standards and regulatory techniques exercise a direct influence on domestic policy debates and legal instruments across the world.⁵⁸ This paper argues that the EU debates on the legal treatment of domestic workers offer to this global audience a notion of working conditions entitlements as fundamental. This fundamentality narrative, in turn, offers a range of insights that illuminate understanding contemporary labour law, including on the preservation of working conditions in deteriorating regulatory projects, the ongoing engagement of labour law and human rights, and the evolving legal narratives of acceptable conditions of work.

⁵⁵ Council Directive 92/85 (EEC) on the introduction of measures to encourage improvements in the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391) [1992] OJ L348/1.

⁵⁶ This discourse is most prominent in the European Commission’s 2006 labour law ‘Green Paper’: EUROPEAN COMMISSION, MODERNISING LABOUR LAW TO MEET THE CHALLENGES OF THE 21ST CENTURY (2006), http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0708en01.pdf.

⁵⁷ Council Directive 92/85, *supra* note 55 above.

⁵⁸ On the influence of the EU instruments on non-standard work in Korea, for example, see SANGHEON LEE AND BYUNG-HEE LEE, MIND THE GAPS: NON-REGULAR EMPLOYMENT AND LABOUR MARKET SEGMENTATION IN THE REPUBLIC OF KOREA (2009).

The ascription of fundamentality to conditions of work, this paper suggests, has its origins in a project that has been pursued over the last two decades through the Union's 'atypical work' standards, a package of three measures – the Part-time Work (PTWD),⁵⁹ Fixed-term Work (FTWD)⁶⁰ and Temporary Agency Work Directives (TAWD)⁶¹ – that employ merged equality/specific regulation models to establish Europe-wide minimum standards for these forms of NSW.⁶² The contention is that the origins of the fundamentality narrative can be identified in the regulatory logic of the most recent of these NSW instruments, the 2008 TAWD.⁶³ It is instructive, it can be suggested, to consider the TAWD framework in some detail. This instrument has been analysed to address its implications for the regulation of NSW.⁶⁴ This piece offers a reassessment of the TAWD, which centres on its relevance to the evolution of legal narratives on conditions of work. The aim is to set the scene for a consideration of the intersection of NSW/working conditions regulation in the domestic work debates.

The TAWD follows the pattern of its predecessors by mandating equal treatment for TAWs with an SER comparator, in this case a directly-hired employee. The Directive diverges from the earlier instruments, however, by rendering working conditions the linchpin of its equality strategy. The PTWD⁶⁵ and FTWD⁶⁶ mandate an open-ended entitlement to equal treatment. The TAWD, in contrast, is narrowed by the articulation of its central entitlement: it assures TAWs only the same “basic working and employment conditions” (BWEC) that would apply if they had been directly recruited.⁶⁷ The Directive's elaboration of BWEC, moreover, confines the equality entitlement to four dimensions of working conditions - working time, pay,⁶⁸ protective measures for pregnant and breast-feeding workers,⁶⁹ and access to the employer's child-care facilities,⁷⁰ although equal treatment has also been required under EU health and safety instruments since 1991.⁷¹

⁵⁹ Council Directive (EC) 97/81 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP AND THE ETUC [10998] OJ L14/9.

⁶⁰ Council Directive (EC) 99/70 concerning the Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L175/43.

⁶¹ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on Temporary Agency Work OJ L372, 5 December 2008, p. 9.

⁶² See further DEIRDRE MCCANN, *REGULATING FLEXIBLE WORK* (2008).

⁶³ Directive 2008/104/EC, *supra* note 61. On the Directive generally, see Nicola Countouris and Rachel Horton, *The Temporary Agency Work Directive: Another Broken Promise?* 38(3) *INDUSTRIAL LAW JOURNAL* 329 (2009).

⁶⁴ Countouris and Horton, *id*; Leah Vosko, *Less than Adequate: Regulating Temporary Agency Work in the EU in the Face of an Internal Market in Services* 2(3) *CAMBRIDGE JOURNAL OF REGIONS, ECONOMY AND SOCIETY* 395 (2009).

⁶⁵ Council Directive 97/81/EC, *supra* note 59, Clause 4(1).

⁶⁶ Council Directive 99/70/EC, *supra* note 60, Clause 4(1).

⁶⁷ Article 5(1).

⁶⁸ Article 3(1)(f).

⁶⁹ Article 5(1).

⁷⁰ Article 6(4). In contrast to the general equality entitlement, TAWs can be excluded from access to child-care facilities if “objectively justifiable.” Member States are also required to take measures, or promote dialogue, to improve access to child-care facilities in temporary agencies, including during periods between assignments, Article 6(5)(a). The Directive also requires compliance with equal treatment measures, which are aligned with the content of the EU discrimination regimes, Article 5(1)(b).

⁷¹ Council Directive (EEC) 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship [1991] OJ L 206/19. Directive 91/383 was the sole product of early efforts to regulate TAW at the EU level.

It has been observed that the BWEC model denotes a narrowing of the EU legal project on atypical work.⁷² Perhaps most notably, TAWs can legitimately be restricted in accessing the training and promotion opportunities that are available to the client's direct-hire employees, despite such opportunities being likely to improve the quality of TAW and the opportunities available to its incumbents. Nor can TAWs demand employment security, irrespective of the duration of their tenure with a client. The FTWD contains a 'standardising' strategy⁷³ that requires fixed-term contracts to be deemed of indefinite duration⁷⁴ after a specified period⁷⁵. The conversion of tripartite arrangements to direct-hire contracts, however, is not required by the TAWD, and TAWs are excluded from the coverage of the FTWD.⁷⁶

Crucial to gauging the health of the EU regulatory project on NSW, the TWAD is equally essential to evaluating the Union's contemporary rendering of conditions of work regulation. In this guise, the Directive can be argued to offer a distinct, but complementary, account of the BWEC model. That is, by configuring working conditions as the extent of equal treatment obligations across the NS workforce, and discarding other compelling options, the Directive has characterised working conditions entitlements as fundamental. This articulation of the fundamental, further, was underpinned by a recourse to the human rights dimension of the EU. The Directive hitches the Charter of Fundamental Rights to the cause of NSW regulation, in an assertion that it is designed to ensure compliance with Article 31 ("fair and just working conditions").⁷⁷ The TAWD thus revealed the incipient influence of the human rights narrative in regulating NSW in the EU.

The Directive offered an intriguing account of legal entitlements on working conditions, given their legacy of exclusion from international-level elaborations of the fundamental. It is a model that holds some promise for the substantive future of working conditions protections, even if most useful in supporting the retention of these rights as the minima of crumbling regulatory frameworks (its function, in essence, in the NSW regime). For labour law's broader engagement with human rights, moreover, the TAWD suggested the longstanding subordination of working conditions within the human rights canon, addressed elsewhere,⁷⁸ to be eroding.

The BWEC schema as a model for fundamental working conditions rights, however, harbours certain risks to the protective strength of working conditions regulation, which hint at the broader risks that can potentially be posed by NSW frameworks to the mainstream of labour law. By singling out working time, wages, and HS as the legitimate objects of equality, the EU NSW regime has bifurcated working conditions entitlements into fundamental rights, on which equal treatment is required, and second-tier protections, on which equal treatment is discretionary. Such bifurcation strategies inevitably trigger objections of the kind levelled at the ILO's core/non-core experiment. The most compelling, from the international experience. They risk exiling elements of labour law's canon of protections to hostile territory, where they can fall prey to neoliberalism's taste for rights that cannot lay claim to fundamentality.

⁷² Vosko, *supra* note 63; Countouris and Horton, *supra* note 63.

⁷³ McCann, *supra* note 62, at 131-135.

⁷⁴ Directive 99/70, *supra* note 60, Clause 5.

⁷⁵ Member States are offered a choice to limit either the duration of the relationship or the number of contract renewals, Clause 5(1).

⁷⁶ Preamble.

⁷⁷ Preamble.

⁷⁸ Hunt, *supra* note 4; McCann, *supra* note 4.

Even if the merit of legal strategies that rank working conditions protections is conceded, reservations remain about the imagery of fundamental rights offered by the TAW regime. This elaboration of decent working conditions is strikingly constrained. Its flaw is the restriction of the work/family dimension of the equality entitlement to health and safety and childcare. The consequence is that the Directive hosts a model of conditions of work - hours, wages, HS – that is strikingly narrow; indeed, comparable to the one that underpinned the first ILO standards in 1919. This equality model is also outmoded. By excluding the bulk of work/family entitlements, the TAWD is adrift from European labour law's frameworks and discourses as they have been galvanised in recent decades by the absorption of work/family reconciliation as a regulatory objective.⁷⁹ The EU regime withholds from TAWs (in the absence of Member State intervention) all national and lower-level maternity and parental entitlements beyond the EU-level minima. This excludes all national (and lower-level) entitlements that extend beyond the relevant EU Directives, including the paternity and paid parental leave schemes that feature in a number of labour law regimes across Europe.⁸⁰ Nor does the Directive embrace entitlements to request adjustments in working hours, despite their appearance, albeit in non-binding form, in the Part-Time Work Directive.⁸¹ TAWs are therefore impeded in benefiting from the last decade's primary innovations in work/family and working time regulation.⁸²

This reassessment of the TAWD, by clarifying the implications of Europe's transnational NSW regime for conditions of work regulation, sets the scene for an assessment of the unfolding of the EU-level regulation of domestic work. To begin with an overarching observation, the rapid progress towards ILO standards on domestic work has left the EU exposed. It retains a legal framework now discredited at the international level: one in which domestic workers are excluded from generally-applicable norms. On a global scale, the EU labour law regime is not an outlier. The evidence on national regulatory frameworks generated by the ILO standard-setting project has revealed labour law regimes across the world to have conceptualized domestic work as a unique work-form, inherently unsuited to regulation.⁸³ Further, this research reveals the exclusionary model to have had a particular resonance in the field of working conditions laws. Even where domestic workers are covered by most generally-applicable laws, they are often specifically excluded from the coverage of working conditions laws.⁸⁴

The EU's labour law framework is of this type. Although it has not attracted comment in the scholarly literatures, the exclusionary strategy is strikingly prominent in EU instruments on conditions of work. Uniquely among NSWs, domestic workers are specifically excluded from the coverage of key working conditions EU instruments, namely the Working Time Directive (WTD) and the maternity protection standard, the Pregnant Workers Directive (PWD).⁸⁵

⁷⁹ See in particular JOANNE CONAGHAN AND KERRY RITTICH EDS., *LABOUR LAW, WORK AND FAMILY* (2005).

⁸⁰ Countouris and Horton, *supra* note 63. Under the recently revised Parental Leave Directive, unpaid paternity leave is explicitly extended to TAWs. Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on Parental Leave Concluded by BUSINESSEUROPE, UEAPME, CEPP and ETUC and repealing Directive 96/34/EC, Clause 1(3).

⁸¹ Clause 5(3)(a)-(b).

⁸² This is the case, for example, with respect to the United Kingdom right to request adjustments to working hours, from which temporary agency workers are excluded, Employment Rights Act 1996 (UK), s 80F(8)(a)(ii), (b).

⁸³ ILO, *supra* note 48.

⁸⁴ *Id.*

⁸⁵ Council Directive 92/85, *supra* note 55.

These exclusions emerge from the political settlement that grounded EU working conditions laws in the realm of health and safety (HS).⁸⁶ Its consequence is that the HS ‘Framework’ Directive 89/391⁸⁷ governs the scope of central working conditions Directives and ties the working conditions instruments to the broader exclusion of domestic workers from the HS regime.

The initial proposal for Directive 89/391 reflected a commitment on the part of the European Commission to an expansive coverage for European HS standards (CEC 1988). The Commission observed that HS frameworks in a number of Member States excluded private households and domestic-service employees, and highlighted the broad scope of its own proposal, to cover sectors and forms of work frequently excluded from, or inadequately addressed in, national laws.⁸⁸ The proposed Directive implicitly included domestic workers,⁸⁹ offering expansive definitions of both ‘the workplace’ (“any place to which the worker has access in the undertaking and/or establishment”) and “the worker” (“any person who performs work in some form, including students undergoing training and apprentices”).⁹⁰ This expansive approach, however, was jettisoned during the legislative process, generating a Directive pared more closely to align with the conventional parameters of HS legislation. As a result, although Directive 89/391 defines its coverage relatively broadly, it singles out domestic workers as its sole explicit exclusion.⁹¹ They are consequently excluded from the Directive’s progeny, including the WTD and PWD.

In recent years, however, these exclusions have triggered a skirmish among the EU institutions over whether the expansion strategy should be used to reform the health and safety regime. This dispute is being pursued as part of broader efforts to refashion the EU working conditions norms, and has emerged with particular clarity in a process of revision of the PWD initiated by the European Commission in 2008.⁹² The initial Commission proposal omitted any reference to domestic workers,⁹³ prompting the European Parliament to call for the PWD to be broadened in scope. This effort returned to an enduring theme of the Parliament’s work: as far back as the millennium, its *Resolution on Regulating Domestic Help in the Informal Economy* had called for domestic work to be brought within the ambit of legislation and collective agreements at both Member State and EU-level. This assertion was subsequently channelled directly towards working conditions reform, and most expansively

⁸⁶ See JILL MURRAY, TRANSNATIONAL LABOUR REGULATION: THE ILO AND EC COMPARED (2001).

⁸⁷ Council Directive 89/391 of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work 89/391/EEC, Article 3.

⁸⁸ COMMISSION OF THE EUROPEAN COMMUNITIES, PROPOSAL FOR A COUNCIL DIRECTIVE ON THE INTRODUCTION OF MEASURES TO ENCOURAGE IMPROVEMENTS IN THE SAFETY AND HEALTH OF WORKERS AT THE WORKPLACE (1998).

⁸⁹ Draft Article 2.

⁹⁰ Commission of the European Communities, *supra* note 88. Limited derogations were also foreseen for certain specific public sector activities (e.g. armed forces, police) and certain activities in the civil protection services, draft Article 2(2).

⁹¹ The Directive extends to “any person employed by an employee, including trainees and apprentices but excluding domestic servants,” Article 3(a).

⁹² COMMISSION OF THE EUROPEAN COMMUNITIES, PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING COUNCIL DIRECTIVE 92/85/EEC ON THE INTRODUCTION OF MEASURES TO ENCOURAGE IMPROVEMENTS IN THE SAFETY AND HEALTH AT WORK OF PREGNANT WORKERS AND WORKERS WHO HAVE RECENTLY GIVEN BIRTH OR ARE BREASTFEEDING COM(2008) 637 final.

⁹³ *Id.*

articulated in the Parliament's response to the Commission's HS strategy for 2007-2012,⁹⁴ in a Resolution of 15 January 2008. The Resolution called on the Commission and Member States to amend the HS Directives to govern "at-risk" professions, including domestic work.⁹⁵ It was subsequently fashioned into a proposal for legislative design, in a call for the PWD explicitly to cover domestic workers (to extend to "pregnant workers employed under any type of contract, including domestic work").⁹⁶

These debates are pertinent to the project that is pursued in this paper, of tracing the intersection of NSW and conditions of work regulation. Centrally, they can be argued to solidify, in the discourses of EU labour law policy, the ascription of fundamental status to working conditions entitlements. Further, this recourse to fundamentality is itself more firmly tethered to human rights discourse. The domestic work debates thus bolster the innovations identified earlier in the regulatory framework on TAW. As an illustration, to contend that HS entitlements should extend to the entire labour force, the 2008 Resolution melded an assertion of the human rights status of working conditions entitlements with the imagery of an EU-level floor of legislated rights.

[S]uch protection is ultimately founded on the fundamental right to physical integrity, and opt-outs from OHS protection legislation jeopardise the health of workers and equal opportunities and may trigger a downward trend in such protection.⁹⁷

Whether this language of fundamentality will crystallise into concrete outcomes remains to be seen. So far, the Commission has resisted pressure to adjust its proposals to envisage a revised PWD that would embrace domestic workers. More recently, the reform of the PWD has been stalled by the recession's dampening effects on working conditions regulation.⁹⁸ Certainly, rationales can readily be identified for expanding the personal scope of the HS Directives, even if confined within the parameters of EU discourse. There is a straightforward argument to be made, for example, that the extension of these norms would be as likely as the TAWD to further compliance with Article 31 of the Charter on Fundamental Rights. Further, the adoption of the ILO domestic workers standards seems to have prompted the Commission to soften its tone on the expansion strategy, and even to hint at future initiatives towards specific regulation.⁹⁹ Despite the indeterminacy of their outcomes, however, the point stands that the domestic work debates are reaffirming, and perhaps even strengthening, the

⁹⁴ COMMISSION OF THE EUROPEAN COMMUNITIES, STRATEGY 2007-2012 ON HEALTH AND SAFETY AT WORK 2007/2146(INI) (2007).

⁹⁵ European Parliament Resolution of 15 January 2008 on the Community Strategy 2007-2012 on Health and Safety at Work (2007/2146(INI)) P6_TA(2008)0009, para 43.

⁹⁶ European Parliament Legislative Resolution of 20 October 2010 on the proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding COM(2008)0637 – C6-0340/2008 – 2008/0193(COD).

⁹⁷ The Resolution refers to right to respect for physical integrity of the person in Article 3 of the Charter of Fundamental Rights. The Preamble includes a reference to Article. For similar reasoning, see the discussion of the international standards by the ILO CEACR in ILO, *supra* note 28; see further McCann, *supra* note 4.

⁹⁸ EUROPEAN PARLIAMENT, MATERNITY LEAVE REVISIONS CONTINUE TO SPLIT EP AND COUNCIL, 26 October 2011 (Press Release), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20111014FCS29306+0+DOC+XML+V0//EN#title8>.

⁹⁹ In response to a Parliamentary question of 14th April 2011, Laszlo Andor of the European Commission responded that the Commission had no plans to amend the health and safety legislation "at this moment" but that the ILO standards offered "an opportunity to think about new rules on domestic workers as a group." Available from <http://eur-lex.europa.eu/en/questions/questions.htm> (last accessed, 5 February 2012).

fundamentality and human rights narratives that were previously encountered in the NSW regime. It suggests, then, that the ascription of fundamentality to working conditions entitlements can be characterised as an enduring theme in the regulatory language of the EU.

2.2 The specific regulation strategy: challenging mainstream norms?

Paralleling the EU-level debates on the expansion strategy, the recent turn towards the specific regulation of domestic work should also be understood as a crucial contribution to the evolution of contemporary working conditions regulation. The specific regulation project intensifies the engagement of NSW laws with conditions of work, as both a recurring feature of the debates and a prominent element of the emerging regulatory frameworks. This point can be substantiated by considering the most visible of the specific regulation instruments, the ILO's Domestic Workers Convention, 2011 (No. 189) and Recommendation (No. 201).

The ILO standards illustrate the second frontier of domestic work regulation identified in Section One, by engaging in detail with conditions of work regulation. The standards are not comprehensive. Most significantly, work/life reconciliation has a marginal presence.¹⁰⁰ The treatment of working conditions in the domestic workers standards is substantial, however, when contrasted with the ILO's earlier NSW instruments. The Convention embodies an overarching exhortation that domestic workers should enjoy "fair terms of employment as well as decent working conditions."¹⁰¹ It also addresses in turn a set of central dimensions of conditions of work, namely abuse, harassment and violence,¹⁰² working time,¹⁰³ wages¹⁰⁴ and health and safety.¹⁰⁵

The prominence of working conditions in these standards, then, coincides with, and reinforces, its resurgence in the Organization's post-crisis policy discourse (see further Section One above). The domestic workers standards have also, it will be argued in this Section, particularly substantial implications for assessing the intersection of NSW laws within mainstream working conditions norms. To illustrate this point, the remainder of this Section singles out a dimension of working conditions on which, it is argued, these standards have the potential to have a particularly meaningful influence, namely working time.

Working hours are identified in the (rather sparse) empirical research as one of the myriad deficiencies of domestic work. Although much of the available data is drawn from small-scale surveys, they suggest that domestic staff, globally, are particularly subject to excessive working hours¹⁰⁶ and to unpredictable schedules.¹⁰⁷ It has been argued elsewhere that it is

¹⁰⁰ It appears as a prohibition in the Recommendation on requiring domestic workers to undertake pregnancy testing or to disclose their pregnancy status, Clause 3(c). There is also a suggestion in Clause 5(2)(a) that Members give special attention to the needs of domestic workers under the age of 18 and above the minimum age of employment to take measure to protect them, including by strictly limiting their hours of work to ensure adequate time for *inter alia* "family contacts."

¹⁰¹ Article 6

¹⁰² Article 5.

¹⁰³ Article 10.

¹⁰⁴ Articles 11, 12.

¹⁰⁵ Article 13.

¹⁰⁶ For example, HUMAN RIGHTS WATCH, BAD DREAMS: EXPLOITATION AND ABUSE OF MIGRANT WORKERS IN SAUDI ARABIA, <http://www.hrw.org/end/node/11999/section/3> [accessed 4 February 2012].

¹⁰⁷ ALESSANDRA CANCEDA, EMPLOYMENT IN HOUSEHOLD SERVICES (2001); RIMA SABBAN, UNITED ARAB EMIRATES: MIGRANT WOMEN IN THE UNITED ARAB EMIRATES. THE CASE OF FEMALE DOMESTIC WORKERS (2002); Ray Jureidini, *L'Echec de la Protection d L'Etat: Les Domestiques*

productive to situate the working time schedules within the preoccupations and analytical concepts of the mainstream working time literature.¹⁰⁸ Most constructively, this strategy permits these schedules to be reconceptualised as forms of working time flexibility.

In domestic work, conduits to working time flexibility are indispensable to addressing fluctuating and unpredictable care needs. Presently, however, this flexibility appears to be derived primarily from working time schedules that are now widely, if not uniformly, deemed unacceptable in other segments of the labour market. Domestic work has resisted working time regulation in part because it is widely understood to demand largely unconstrained availability. The prevailing characterisation of domestic work as ungovernable, is not exclusively derived from its location in the private sphere, but also from the narrative of its working hours as inescapably extensive. Recognising domestic work regulation as a stage in the progressive expansion in the occupational scope of working time laws, however, permits the temporal dimension of domestic work to be reformulated. Rather than an adjunct of the job, it is instead configured as an unrestrained version of employer-oriented working time flexibility, and therefore, most significantly, amenable to the regulatory mechanisms that constrain such flexibility.

This outcome, however, demands novel regulatory strategies. The classical techniques of working time law - hours limits and minimum rest periods – can, to a degree, constrain working time flexibility, by curbing long hours. These methods feature in the Domestic Workers Convention, primarily as part of an equality strategy. The Convention requires ratifying member States to ensure that domestic workers are treated like “workers generally” with respect to normal hours, overtime compensation, daily and weekly rest, and paid annual leave.¹⁰⁹ The Convention also contains a specific minimum standard for weekly rest, of 24 consecutive hours.¹¹⁰ A key component of the long and unpredictable hours in domestic work, however, is the substantial presence of ‘on-call’ time: periods in which the worker is available to the employer without engaging in the primary activities of the job.¹¹¹ Even when long hours are framed as a strategy for working time flexibility, on-call work remains a regulatory challenge, beyond the reach of conventional strategies. Further, its conceptualization in regulatory frameworks has long been observed to be ill-developed.¹¹²

On-call periods, however, are gradually coming into focus. This advance has unfurled in the mainstream of working time regulation, in the context of a high-status profession, and the highly regulated labour markets, of western Europe. On-call time surfaced at the EU level when the WTD was extended to cover the health sector, in the shape of a contention that the sector cannot be framed by the constraints of the Directive’s maximum 48 hour working hours limit. For this reason, the on-call hours of hospital doctors should not count towards the hours limit. This dispute has culminated in an EU-level standoff over the definition of working time in the WTD.

Etrangers au Liban 19(3) REVUE EUROPEENNE DES MIGRATIONS INTERNATIONALES 95 (2003); ILO GENDER AND MIGRATION IN ARAB STATES: THE CASE OF DOMESTIC WORKERS (2004).

¹⁰⁸ McCann and Murray, *supra* note 3. The following discussion of on-call work draws substantially on this report.

¹⁰⁹ Article 10.

¹¹⁰ Article 10 (2).

¹¹¹ For example, Francesca Degiuli, *A Job with No Boundaries: Home Eldercare Work in Italy* 14 EUROPEAN JOURNAL OF WOMEN’S STUDIES 193 (2007).

¹¹² ALAIN SUPIOT, BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE (1999). On domestic work, see Guy Mundlak, *Recommodifying Time: Working Hours of ‘Live-In’ Domestic Workers* in Conaghan and Rittich, *supra* note 79 125 (2005).

At variance with the regulatory strategy advocated by the European health sector lobby, a unitary model of working time was asserted by the European Court of Justice (ECJ) in its rulings in *Simap*¹¹³ and *Jaeger*,¹¹⁴ in which it held that ‘internal’ on-call periods (performed on the premises of the employer) are working time and should therefore count towards the WTD’s weekly maximum.¹¹⁵ This unitary approach has since implicitly been endorsed by the ILO’s Committee of Experts on the Application of Conventions and Recommendations (CEACR), which has clarified that the notion of working time in the international Hours of Work standards¹¹⁶ embraces on-call hours.¹¹⁷ The European Commission, in contrast, responded to the ECJ’s rulings by promoting a model in which working hours are bifurcated into ‘active’ and ‘inactive’ time, the latter equated with on-call hours and excluded from the computation of working hours, wages, or both. This model was included among the key reforms for the abortive 2004-2009 revision of the EU Working Time Directive¹¹⁸ and lingers in the Commission’s renewed proposals for reform.¹¹⁹

Highlighting the affinities of the extensively regulated, male-dominated medical profession and the highly feminized and deregulated milieu of domestic work, the regulatory conundrum of on-call time is now being addressed in formalization strategies on domestic work. Domestic (statutory and bargained) frameworks offer both models. The bifurcation schema, for instance, is perhaps most prominent in the French *Convention Collective Nationale des Employées de Maison*, which extends the activity/inactivity duality to domestic workers in caring roles.¹²⁰ The most prominent repository of the unitary approach is the South African *Sectoral Determination No. 7* (SD 7), the key domestic work regime of the global South. Within this framework, ‘on-call hours’ are regulated, rather than by exclusion from the ambit of working time, by limiting their incidence and duration.¹²¹

It has already been observed that in the project of domestic work regulation, these twin models for conceptualising and regulating on-call periods are becoming more precisely delineated, conspicuously opposed, and prominently available to integrate into broader projects of working time law reform.¹²² The central concern for the apt regulation of domestic work has also been identified, as the deficient protective strength of the bifurcation model. Domestic work frameworks that integrate the inactivity/activity duality bear a set of risks that

¹¹³ Case C-303/98 *SIMAP v Conselleria de Sanidad y Consumo de la Generalidad Valenciana*;

¹¹⁴ Case C-151/02 *Landeshaupstadt Kiel v Jaeger*.

¹¹⁵ See Deirdre McCann *The Role of Work/family Discourse in Strengthening Traditional Working Time Laws: Some Lessons from the On-Call Work Debates* 23(1) *Law in Context* (2004).

¹¹⁶ Hours of Work (Industry) Convention, 1919 (No. 1); Hours of Work (Commerce and Offices) Convention 1930 (No. 30).

¹¹⁷ ILO, *supra* note 28, para 46.

¹¹⁸ Council Directive (EC) 93/104 concerning certain aspects of the organization of working time [1993] OJ L307/18.

¹¹⁹ COMMISSION OF THE EUROPEAN COMMUNITIES, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS. REVIEWING THE WORKING TIME DIRECTIVE (SECOND-PHASE CONSULTATION OF THE SOCIAL PARTNERS AT EUROPEAN LEVEL UNDER ARTICLE 154 TFEU) COM(2010) 801 FINAL (2010). Although the Commission has nominally jettisoned the bifurcation model, the 2010 proposals have comparable implications for remuneration.

¹²⁰ See NICKY LE FEUVRE, EMPLOYMENT, FAMILY AND COMMUNITY ACTIVITIES: A NEW BALANCE FOR MEN AND WOMEN – SUMMARY OF THE FRENCH NATIONAL REPORT (2000); ILO, *supra* note 48.

¹²¹ Clause 14.

¹²² McCann and Murray, *supra* note 3.

are associated with the bifurcation technique: the complexities of accurately classifying time periods, and, more significantly, long hours and lost wages.¹²³ Yet the strategy also harbours more probing threats to the integrity of the SER's working time dimension.¹²⁴ Conceivably, it hosts a strategy for a legalized casualisation of jobs that do not involve discrete and delineated periods of on-call time. Harboured in the logic of this technique is the capacity to drain 'slack time' from the working day, by excluding certain 'inactive' periods from the definition of working time, thus mapping the ambit of remunerated time to the productive needs of the employer.¹²⁵

The new international standards on domestic workers offer an opportunity to assess which of the two vying models has the upper hand, with significant implications for the regulation of working time, in domestic work and beyond. Prior to their adoption, it was argued that the standards should integrate the unitary approach to working time, to cement this model in the face of substantial pressures to abandon it.¹²⁶ The outcome, in stark contrast, is that the standards have shifted the ILO's regulatory landscape towards an acceptance of the bifurcation strategy.

This outcome stems from the solution brokered in Article 10(3) of the Convention, which provides that on-call ('standby') periods "shall be regarded as hours of work to the extent determined by national laws, regulations or collective agreements, or any other means consistent with national practice."¹²⁷ Convention No. 189, then, (1) envisages a continuum of viable regulatory strategies for the classification of on-call work and (2) devolves this selection to domestic policy actors. By deferring to domestic-level regulatory frameworks, it implicitly permits on-call hours to be discounted from working time, thereby legitimating the bifurcation model as a viable regulatory strategy. As a consequence, domestic workers are subject to less favourable treatment, with respect to their working hours, than both SER workers and NSWs who are covered by the Hours of Work Conventions. The latter constituencies can claim international-level commitment to the classification of on-call periods as working hours and, more broadly, to a unitary model of working time. The former are at the mercy of domestic-level regulatory selection, which can permissibly range along a continuum from full computation of on-call hours as working time to the comprehensive exclusion of these hours.

The deference shown by the Domestic Workers Convention to domestic governments and social partner organizations sits uneasily with the Committee of Expert's assertion of the unitary model under the Hours of Work standards. This discrepancy presumably can be explained by the genesis of the Article 10(3) formula. Rather than stemming from a widespread preference for the bifurcation strategy among the policy actors in the standard-setting process, it appears to have been grounded in a misunderstanding of the drafting strategies that would be most likely to generate a desired regulatory outcome. Closer analysis reveals an assumption, reflected throughout the policy documents and debates, that the Article 10(3) formula requires on-call hours to be counted as working time. This

¹²³ Le Feuvre, *supra* note 120.

¹²⁴ On the resonance of the SER for the regulation of working time precariousness, see McCann and Murray, *supra* note 3, at 26.

¹²⁵ McCann and Murray, *supra* note 3, at 28-32.

¹²⁶ *Id.*

¹²⁷ The Recommendation offers a slightly different formula, of comparable effect, that member States "to the extent determined by national laws, regulations or collective agreements, should regulate" specified elements of standby hours, Clause 9.

interpretation, contrary to any convincing reading of the text, was accepted from the earliest International Labour Office contribution¹²⁸ to the ILC Committee debates. During the 2011 ILC, for instance, objections to Article 10(3) were voiced by the Employer's Group and the government of India in order to *oppose* the mandatory ascription of on-call periods to working time, while it was defended by the Worker's Group and the Brazilian and US governments, which wished to retain the unitary model.¹²⁹

These processes, then, reflect a failure on the part of the various actors involved to recognise the influence of drafting strategies in realising underlying policy objectives, and to countenance that the former might betray the latter. More tellingly, they can also be identified as part of a broader theme of regulatory uncertainty, which characterise the ILO's recent legal policy interventions in the field of working conditions. This theme has been suggested elsewhere to be reflected in the ILO's high-level policy discourse, in the *Global Jobs Pact*.¹³⁰ The treatment of on-call work in the domestic workers standards seems to confirm that, as working conditions have become more central to transnational legal policy, heightened acceptance of regulatory intervention by the policy and standard-setting organs of the ILO has been paired with a tentative grasp of the strategies and frameworks that are available to regulate this element of working life. This deficiency, it can be suggested, is weakening the Organization in the face of substantial external and internal pressures to dismantle its historical regulatory achievements.

To tease out the possible implications of this treatment of on-call work for mainstream working time norms, it can be suggested that the domestic work standards have embedded a flaw in the ILS, which can be exploited to deregulatory ends. In particular, the Article 10(3) strategy is available to influence any future debates on the reform of the mainstream ILO working time regime. Such reform has been countenanced as an Organizational objective periodically over the last decade, most notably by the Committee of Experts in its 2005 assessment of the Hours of Work Conventions,¹³¹ and, more recently, by a Tripartite Meeting of Experts on Working Time Arrangements, which was convened in October 2011 with the purpose of devising "future ILO guidance" on working time.¹³² These developments could conceivably also inform EU debates on the definition of working time, if the care work affinities are identified.

Much depends, then, on the unpredictable processes of reception of the international norms into domestic regimes, and their broader dissemination to cognate legal policy discourses, including those of other transnational arenas. These processes, it should be hoped, will reflect the spirit, rather than the letter, of the Convention. It is also possible that the discrepancy between the domestic workers and hours of work regimes could be reconciled by (highly) creative interpretative footwork by the Committee of Experts, towards reasserting a unitary model of working time across the body of the international standards. An alternate and conceivable future, however, is that the dissemination of the bifurcation strategy under the

¹²⁸ ILO, *supra* note 48, at 396.

¹²⁹ ILO, REPORT OF THE COMMITTEE ON DOMESTIC WORKERS (2011), paras 547-553.

¹³⁰ ILO, *supra* note 26.

¹³¹ ILO, *supra* note 28, at 105-107.

¹³² ILO WORKING TIME IN THE TWENTY-FIRST CENTURY. REPORT FOR DISCUSSION AT THE TRIPARTITE MEETING OF EXPERTS ON WORKING-TIME ARRANGEMENTS (17-21 OCTOBER 2011), http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_161734.pdf.

auspices of the international standards will embed an insufficiently protective model, which will subsequently become difficult to displace.

Conclusions

This paper has contended that the recent evolution of transnational-level policy discourses on labour regulation should be conceptualised, in part, as a struggle over the significance of legal regulation of working conditions. Framing the evolution of regulatory policy in this way confirms the ILO's experiment in identifying core labour standards to have been neglectful of the role of regulation in pursuing decent working conditions. Similarly, the World Bank's experiment in disseminating guidance on regulatory design through the EWI is exposed as a conduit for flexibility narratives that have tightened their hold on conditions of work laws. EU employment policy, in contrast, has merged job quality and employment creation goals, to forge a policy narrative receptive to the pursuit of decent conditions of work. The paper has also suggested, however, that the financial crisis and ensuing recession have been associated with substantial, if incomplete, reformulations of these policy narratives. A central outcome has been the heightened presence of conditions of work at the international level, where it has been ushered closer to the heart of international policy discourses in the ILO's 2008 Declaration and *Global Jobs Pact*, and in the reform of the World Bank's EWI. In contrast, the paper has highlighted the fading of the job quality objective in the employment policy discourses of the EU.

It has further been suggested that to analyse the working conditions dimension of labour regulation without attending to legal frameworks on NSW generates a distorted picture of this regulatory terrain. Further, it misses crucial contributions to labour law's conceptual underpinnings and technical strategies, which could enhance the protection of both the NS and SER labour forces. This potential has been explored in an examination of the evolution of the NSW project towards a new frontier for labour law: the regulation of domestic work. Within the EU's 'atypical work' project, this development has been found to have reinforced an existing narrative of conditions of work protections as fundamental entitlements. The specific regulation of domestic work in the ILO standards has been suggested to have particular resonance for the evolution and dissemination of regulatory strategies on working conditions.

These developments can be suggested to have implications for both policy and research. The post-recession resurgence of working conditions in key strands of transnational labour law policy, for example, could be reinforced by recourse to discourses and strategies drawn from the regulation of precarious work, as part of broader efforts to sustain the recession's regulatory advances (such as the range of strategies that have been employed to avoid collective redundancies). This opening is ripe to be exploited by alert policy actors. For future research agendas, it has been suggested that it is worth attending to the interplay of precarious work regulation and mainstream norms. Such work would question whether the regulation of NSW is advancing cognate regulatory fields, including to curb precariousness within the frame of the SER. Otherwise, concerns should be raised for the elaboration of frameworks genuinely protective of the global precarious labour force, whether encased within the SER or in non-standard forms of labour market engagement.